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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 430

THE FLYING TIGER LINE, INC.,

Petitioner,

—against—

PHILIPPINE AIR LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE FLYING TIGER LINE, INC.,

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PHILIPPINE AIR LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, The Flying Tiger Line, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on July 25, 1958, affirming a judgment of the District Court in favor of Respondent and against Petitioner.

Opinions Below

The opinion of the Court of Appeals (Chief Judge Clark) affirming the judgment over against the petitioner is reported in 257 F. (2d) 384 and is also printed as Appendix I, *infra*.

The opinion of the District Court (Judge Walsh) granting judgment over against the petitioner is officially unreported but is cited in 5 Aviation Cases 17,621 and is printed as Appendix II, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on July 25, 1958. A timely petition for rehearing was filed on August 8, 1958, and was denied on August 25, 1958; a motion for stay of mandate was duly granted by order dated September 11, 1958. The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254 (1).

Questions of Law Presented

1. Is the respondent entitled to judgment over against the third-party defendant-petitioner for alleged breach of contract on the basis of the doctrine of primary and secondary liability arising by operation of law when the respondent violated the provisions of the written contract between the parties and the contract completely sets forth the liabilities of said parties?

2. May an air carrier, subject to regulation under the Civil Aeronautics Act, 49 U. S. C. §481, *et seq.*, enter into a contract with a foreign air carrier which effects a change in its rights and obligations inconsistent with its filed tariffs?

3. Is the limited liability of the third-party defendant-petitioner pursuant to its tariff on file with the Civil Aeronautics Board waived by an

Interline Agreement requiring said defendant to request from the plaintiff-shipper documents that might have disclosed a special value?

Statement

Orlove originally sued both Philippine Airlines, Inc. and The Flying Tiger Line, Inc. for the loss of a shipment of gold jewelry sent from New York and intended for delivery in Hong Kong. Federal jurisdiction in the District Court was based on diversity of citizenship and amount. Orlove consented to a dismissal against Flying Tiger but Flying Tiger remained in the litigation on the basis of a cross-complaint of Philippine in the nature of a third-party complaint.

The Court of Appeals affirmed a judgment of the District Court in favor of the plaintiff-shipper against Philippine and a judgment in favor of Philippine over against petitioner Flying Tiger. We are here concerned only with the latter.

Facts

Plaintiff Orlove, whose rights are not directly involved here, is "an expert * * * who does a lot of export-import work" (D. C. Op. 29, *infra*).* On several occasions immediately prior to the shipment

* Page references herein to the various appendices in the Court of Appeals and presented herewith are as follows: Those followed by "p" are to plaintiff's appendix (thus, "36p"); those followed by "a" and preceded by Ph or FT are to Philippine's or Flying Tiger's appendices respectively (thus, "Ph. 36a" or "FT. 36a"). "Op." designates Court of Appeals opinion, and "D. C. Op." that of the District Court, printed as appendices I and II to this petition.

here involved he had "shipped a number of packages containing jewelry to his customers in Hong Kong through the facilities of PAL" which had in each case, including the instant one "followed a uniform practice" (Op. 19, *infra*), as did likewise six later ones (FT, 41a). Any declaration of value with respect to Flying Tiger was unimportant to him for he carried insurance against loss (FT, 18a; 4p).

Philippine Airlines is engaged in foreign shipment by air, with tariffs covering only such foreign service (Ph, 15a).

Flying Tiger Line is engaged in domestic shipment by air, with tariffs covering only such domestic service (FT, 142a).

These two carriers had entered into a so-called "Interline Cargo Agreement" (FT, 124a) of which more hereafter. That agreement was filed, but it contained no tariffs, and was not further implemented as to applicable rates, etc.

On Friday, June 10, 1949, plaintiff Orlove, in accordance with the usual practice established by Philippine, telephoned the latter's New York City office to "inquire for an airway bill number" (FT, 43a) which was to be used on the letter of instructions to Philippine (FT, 26a), and advised that he had a box of necklaces for shipment from New York to Hong Kong with a declared value of $24,150 (FT, 25a, 26a).

Philippine gave Orlove the usual instructions which were to deliver the box to a designated agent of Flying Tiger, in New York City (FT, 43a). With respect to export documents such as it is now claimed by Philip-

pine should have been obtained by Flying Tiger, under the contract, for transmittal to Philippine, Orlove was always instructed by Philippine to send them to Philippine at its office, after Flying Tiger had received the goods and given Orlove a copy of the Flying Tiger Airbill Request & Shipping Order which he had signed (D. C. Op. 27).

Orlove then delivered the box to Flying Tiger as instructed by Philippine (FT, 26a), and signed an Airbill Request & Shipping Order dated June 10, 1949 describing the shipment as one box weighing 49¾ pounds with no declared value, the consignee being Philippine Airlines, Inc., San Francisco, California (FT, 45a). The document also provided that the goods were accepted subject to the applicable tariffs, and unless a higher value was declared the liability of the carrier was limited to $50 (FT, 122a). As previously noted, Orlove was insured against loss (FT, 18a; 4p), so that declaration of value was unimportant to him.

The airbill issued by Flying Tiger was in strict accord with applicable law and tariffs. Neither it nor Philippine had any tariff on file showing through rates between New York and Hong Kong, as required if through service had been established (FT, 142a; Ph, 15a). Flying Tiger's tariff covers domestic, the other's foreign shipments solely. There may have been an interline agreement, but no through rates had been authorized in accordance with the statute. With respect to limitation of liability, the provisions of the respective tariffs are inconsistent, Flying Tiger being limited to $50 on failure to declare and pay for excess value (FT, 142a, 122a), Philippine's being limited to 250 francs per kilogram upon different con-

ditions as permitted by the Warsaw Convention (49 St. 3014) if and when it is applicable. Flying Tiger properly limited its airbill to delivery to Philippine as consignee in San Francisco, and applied its tariff provisions as to limitation of liability (FT, 122a).

No declaration of value was made to the agent of Flying Tiger (FT, 65a, 152a) and the contents remained unknown to it (FT, 152a). Only after delivering the box to Flying Tiger, did Orlove mail export documents as requested by Philippine to it (FT, 30a). Flying Tiger received no documents from Orlove (FT, 24a, 82a) and had no communication whatsoever regarding the shipment with Philippine (FT, 150a).

After receipt of the mailed shipper's letter of instructions (3p) by which Philippine "was given the necessary information in precisely the fashion it chose" (Op. 23), Philippine, on Monday, June 13, 1949, issued its own through airwaybill purporting to cover the shipment as a whole from New York to Hong Kong. This agreement (Ph, 13a) was in many respects contrary to law and filed tariffs. Though, as noted above, no through rates had been established, Philippine by this instrument, acknowledged receipt of the package at a time and place contrary to fact and bound itself to transport the package from New York to Hong Kong and to deliver it there to the shipper's customer, at a joint through rate, purporting to be based on "weight" and "valuation".*

Flying Tiger failed to deliver the shipment to Philippine in San Francisco (FT, 34a). There was no proof as to how it was lost.

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* The obligation thus assumed for safe carriage was, of course, the basis for Philippine's liability to the shipper.

REASONS FOR GRANTING THE WRIT

I

The decision of the Court of Appeals is in conflict with an admonition of this Court.

This Court held in *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, 569 that:

> "In view of the new trial to which petitioner is entitled, we believe sound judicial administration requires us to point out that in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate. Ryan Stevedoring Co. v. Pan-Atlantic S. S. Co., supra 350 U. S. at pages 132-133, 76 S. Ct. at pages 236-237."

In *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Co.*, 350 U. S. 124, 133 it was said that the obligation of a stevedore to indemnify the shipowner for injuries to an employee, the stevedoring company having agreed to perform all of the shipowner's stevedoring operations,

> "is not a quasi-contractual obligation implied by law or arising out of a non-contractual relation."

The Court of Appeals held herein that Flying Tiger "made no effort to obtain copies of the Shipper's Letter of Instructions or the invoices and export declarations from the plaintiff, although under the Interline Agreement FTL *had agreed with PAL to do so* in the case of any shipment for export" (Op.

20, 21, emphasis added). The Court of Appeals also held that the Flying Tiger filed tariff did not bar the claim over of Philippine since the use of the tariff as a defense against Philippine "is in effect waived by FTL's *agreement under the Interline Agreement* to request from the shipper documents which would have disclosed the shipment's special value" (id. 24, emphasis added).

Clearly any obligation of Flying Tiger to Philippine is one that only can be predicated upon a breach of the contract between the parties. Without the contract there could be no liability. Therefore, the Court of Appeals failed to heed the admonition of this Court in *Weyerhaeuser* (*supra*) when it stated that the theories of primary or secondary negligence that are inappropriate in the area of contractual indemnity are applicable here where "PAL's right of indemnity arises by operation of law" (Op. 24, Note).

A. Respondent violated the contract provisions together with the law and should not be allowed to recover over.

Under the Interline Agreement (FT, 128a) Philippine was to prepare its airwaybill only from the Philippine Airport of Export, San Francisco (FT, 4a), to the foreign destination. However, in violation of the contract with Flying Tiger, Philippine issued an airbill binding itself for transportation of the shipment from New York to Hong Kong. The airbill was also issued illegally by Philippine as said respondent did not have a filed tariff of through rates from New York. *Rosario Min. Co.* v. *Riddle Airlines*, 3 App. Div. 2d 457, aff'd., no op. 4 N. Y. 2d 755.

The liability of respondent Philippine to the shipper was the result of Philippine's improper issue of an airbill from New York to Hong Kong, instead of following Flying Tiger's proper course of each carrier limiting its obligation to its own route; in that event Philippine would not have been liable for the loss occurring between New York and San Francisco (FT, 34a). There is no authorization in the Interline Agreement for Philippine to issue a bill from New York to Hong Kong; the issuance of same was illegal.

It is established that the immediate cause for Philippine's liability to the plaintiff as found by the District Judge, and approved by the Court of Appeals (D. C. Op. 31; Op. 22, *infra*) was "its own omissions, and not those of FTL". Those omissions lay in Philippine's departure from the Interline Agreement, in having Orlove send the documents to it, instead of delivering them to Flying Tiger and in failing to advise Orlove to make the necessary declaration to the latter. By these omissions by Philippine the court held that Flying Tiger was deprived of the documents which would have "disclosed the shipment's special value" and thereby, upon the court's theory, have afforded the shipper protection vis-a-vis Flying Tiger. Therefore Philippine should not recover over from Flying Tiger the liability of Philippine to the shipper which resulted solely from Philippine violating the Interline Agreement and the law. It is certainly a wide departure from established legal principles and procedure when, as here, a party is permitted to recover for liability incurred by him through his own omissions.

II

The Court of Appeals has decided questions which are fundamental in the relations between carriers and shippers under the acts regulating commerce in a way which is in conflict with applicable decisions of this and other courts. In so departing from established principles the Court of Appeals has established a dangerous and far-reaching precedent, which requires the exercise of this Court's power of supervision.

A. The effect of the decision of the Court of Appeals is that a carrier may lose its right to limitation of liability established in accordance with its tariffs, by the mere fact that it knows that the shipment is of a higher value than the fixed maximum.

The conclusion of the Court of Appeals that Flying Tiger is liable over to Philippine rests entirely upon the premise that Flying Tiger's filed tariff "limited its liability *unless FTL was informed of the value of the shipment*"* (Op. 24).

In other words, according to the court, had Flying Tiger received the documents, these would have "informed [it] of the value of the shipment", and so prevented limitation of liability. In that event, plaintiff would not have had to resort to Philippine's liability. So the court said that "PAL's liability stems entirely from conduct which deprived the plaintiff of rights against FTL [and therefore] PAL is entitled

* Emphasis herein is supplied, unless otherwise indicated.

to be indemnified" [*ibid.*].* As will appear hereafter, Flying Tiger's knowledge of value, obtained otherwise than in accordance with its tariffs, would not have avoided the limitation of liability as between the shipper and Flying Tiger; thus Philippine lost nothing and the conclusion of a right to indemnity must fall.

The court's premise, and therefore its opinion, conflicts with the opinions of this and other courts. The established doctrine relating to limitation of liability by carriers is that where, as here, alternative rates are offered, it is wholly within the shipper's election to accept the higher or lower rate, the amount which he may recover in the event of loss being dependent upon his making the declaration and payment in the manner prescribed by the tariff.** The carrier may know that the value was greater than the amount of limited liability, but that does not impose further liability on it.

> *Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278;
> *Wells, Fargo & Co.* v. *Neiman-Marcus Co.*, 227 U. S. 469, 476-7;
> *Mangin* v. *Dinsmore*, 70 N. Y. 410, 416.

The construction of the Flying Tiger tariff and the principle upon which the decision in the instant case

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* The assumption that plaintiff was inadvertently deprived of any rights against Flying Tiger is, strictly speaking, immaterial here. It is however appropriate to note again that as plaintiff was insured against loss he had no reason to incur further expense by making an effective declaration of value.

** Had the valuation of $24,150, which was imparted to Philippine (Ph. 13a), been declared to Flying Tiger in the manner provided for in the tariffs, the amount payable to the latter to afford coverage beyond $50, would have been $24 (FT. 142a, par. 42-b). It is certain that no such charge was made; it could not, therefore, have been imparted to the consignee for collection

turns, viz: that unlimited liability (either directly to the shipper or indirectly to another carrier) may be enforced against the receiving carrier if it has in any way been informed of actual value, "would (in the language of the *Pierce* case) bring about the very favoritism which it is the purpose of the Commerce Act to avoid."

B. A further effect of the Circuit Court's opinion is that a domestic carrier may issue documents effecting a joint export shipment with a foreign carrier though neither has any appropriate tariff on file.

The Court of Appeals expressly concurred with the court below in finding that Flying Tiger "erred here by handling the plaintiff's shipment 'document-wise as a domestic transaction instead of an export transaction'" (Op. 21, Note) from which the district judge had said "our whole difficulty here has stemmed" (D. C. Op. 33).

Flying Tiger could not have handled the shipment in any other way. It was forbidden by 49 U. S. C., §483, §484, to enter any transaction which called for transportation between domestic points served by it and foreign points served by Philippine inasmuch as no through service or through rates had been established. While (as said in *Rosario Mining Co.* v. *Riddle Airlines*, 3 N. Y. App. Div. 2d 457) there "is testimony of an interline agreement * * * there is no proof

as required. (FT. 122a). It is likewise obvious that the lump charge of $35.65 based on valuation, appearing on the Philippine air waybill (Ph. 13a) did not purport to include a $24 item for Flying Tiger, but was only sufficient to have embraced the post-San Francisco shipment. In short, if the principles of the questioned decision were followed, the legislative scheme to avoid inequality between shippers would be rendered a dead-letter.

of the existence of any through rates having been authorized, approved or filed by either carrier." There was no way for Flying Tiger to compel the shipper to supply to it the papers which were obviously intended only to enable Philippine to document its own separate foreign shipment; Flying Tiger could not have refused to carry the box over its own line for failure of the shipper to furnish documents the Flying Tiger tariff did not authorize.

The court's error, arising from the assumed right of Flying Tiger to proceed in some other manner, is obvious. The effect of this erroneous doctrine would be to make nugatory in a marked degree the purposes of the Commerce Act.

III

The limited liability of Flying Tiger was not and could not be waived.

The shipper admitted that he never declared any value at the time of delivery of the box to the agent of Flying Tiger (FT, 65a) and the airbill request he signed provided that the goods were accepted subject to the applicable tariffs and unless a higher value is declared the liability of the carrier is limited to $50 (FT, 122a).

Under the Interline Agreement it is provided that the liability of Flying Tiger shall be only that stated on its airbill and in its filed tariff (FT, 138a). The Flying Tiger filed tariff provides that unless a higher value is declared on the airbill request the liability is limited to $50 (FT, 142a).

The Court of Appeals held that the filed tariff of Flying Tiger did not bar the claim over of Philippine since the use of the tariff as a defense against Philippine is in effect waived by the Flying Tiger agreement under the Interline Agreement to request from the shipper documents which would have disclosed the special value (Op. 24).

The Court of Appeals overlooked the fact that the Interline Agreement specifically provides that the Flying Tiger liability is that stated on its airbill and in its filed tariff. It cannot logically be said that while the contract contains a specific provision as to the extent of liability, the provision is in effect waived by another provision of the agreement that makes no reference to liabilities.

With respect to the holding of the Court of Appeals that Flying Tiger's "filed tariff does not bar PAL's claim here" as any defense based on the tariff was "in effect waived by the FTL's agreement under the Interline Agreement to request from the shipper documents which would have disclosed the shipment's special value" (Op. 24), it need only be said that it would have been unlawful for Flying Tiger to have waived the tariff by an Interline Agreement or otherwise than by approved change in tariff after due notice. Title 49 U. S. Code Section 483(c). "Deviation from [the duly filed rate] is not permitted upon any pretext". *Louisville & N. R. R.* v. *Maxwell*, 237 U. S. 94, 97. Therefore there was no waiver of any valid defense which Flying Tiger had against Philippine.

These matters again present a precedent under the opinion sought to be reviewed which is not only erroneous in law but which also threatens the efficacy of the legislative scheme involving the relations between carriers and shippers, and carriers among themselves.

Conclusion

By reason of the premises, a writ of certiorari should issue to review the judgment of the Court of Appeals herein.

Dated: New York, New York
October 1, 1958

Respectfully submitted,

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APPENDIX I

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 313—October Term, 1957.

(Argued May 1, 1958 Decided July 25, 1958.)

Docket No. 24929

HOWARD ORLOVE, d/b/a H. ORLOVE COMPANY,
Plaintiff-Appellee,

—v.—

PHILIPPINE AIR LINES, INC.,
Defendant-Appellant-Appellee,

—and—

THE FLYING TIGER LINE, INC.,
Defendant-Appellant.

Before:

CLARK, *Chief Judge,* and
HINCKS and STEWART, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Lawrence E. Walsh, *Judge.*

Philippine Air Lines, Inc., and The Flying Tiger Line, Inc., appeal from a judgment for Howard Or-

love, d/b/a H. Orlove Company, against Philippine Air Lines, Inc., for damages for the loss of a freight shipment; and The Flying Tiger Line, Inc., appeals from a judgment against it for indemnification to Philippine Air Lines, Inc. Affirmed.

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CLARK, *Chief Judge*:

This appeal concerns the liabilities of two air line companies for the loss of a shipment of gold jewelry sent from New York to Hong Kong. Plaintiff, the shipper, instituted the action against both Philippine Air Lines, Inc. (PAL), and The Flying Tiger Line, Inc. (FTL), but later discontinued it against the latter. Prior to the discontinuance, however, PAL cross-claimed against FTL for indemnification in case plaintiff succeeded in gaining a judgment against it.

Appendix I

The district court, sitting without a jury, ruled in favor of the plaintiff against PAL for the full value of the lost jewelry and held FTL liable over to PAL for that judgment. Both air lines appeal.

Although the profusion of contract conditions and tariff provisions cited here and to the district court gives this case an air of complexity, the relevant facts and issues present no great difficulty. The shipment in question originated on June 10, 1949, in New York. Plaintiff at that time was engaged in the import-export business. He previously had shipped a number of packages containing jewelry to his customers in Hong Kong through the facilities of PAL, which furnished freight service between San Francisco and Hong Kong. PAL was not licensed to operate between points in the United States, however, and freight shipments originating in New York City were carried to San Francisco by FTL under an Interline Cargo Traffic Agreement between the companies on file with the Civil Aeronautics Board pursuant to 49 U. S. C. §492.

Plaintiff dealt exclusively with PAL. It had followed a uniform practice in arranging for his freight shipments on a number of occasions prior to June 10, 1949. Each time plaintiff wished to make such a shipment he would call the PAL office in New York, giving a clerk there relevant details concerning the shipment. He would then be told the PAL air waybill number assigned to the shipment, which he would note on a form previously given to him by PAL called a "Shipper's Letter of Instructions." The entries on this form required all the information necessary to complete the air waybill, including the name and address

of the consignee, a full description of the goods, and declarations of value for both carriage and customs. Then, at the direction of PAL, the plaintiff would deliver his shipment, addressed to the consignee in Hong Kong, to Mercury General Trucking Company, an agent of FTL, to start its progress westward. He would receive a "receipt" for each shipment so delivered in the form of a so-called "Airbill Request & Shipping Order" of "The Flying Tiger Line, Inc." After this delivery plaintiff would mail the completed Shipper's Letter of Instructions, together with other documents, to the PAL office in New York, to be forwarded to San Francisco. Later PAL would send him the completed air waybill.

On June 10, 1949, the plaintiff followed the same procedure in arranging for the shipment which eventually was lost. He informed Mr. Philiba, a representative of PAL, by telephone that he wished to ship a package of jewelry to Hong Kong. He disclosed the name and address of the consignee, the value of the shipment, and other relevant details; and he was given an air waybill number, which he inserted on the Shipper's Letter of Instructions. Pursuant to Philiba's directions he delivered the package, clearly addressed to the consignee in Hong Kong, to Mercury General Trucking Company, which Philiba said would accept the freight in behalf of PAL. The clerk at Mercury asked him various questions concerning the shipment, but made no inquiry relating to its value. The plaintiff had not been told by PAL to give this information, and he did not volunteer it. While the address on the package thus indicated that it was for export, the clerk at Mercury made no effort to obtain

copies of the Shipper's Letter of Instructions or the invoices and export declarations from the plaintiff, although under the Interline Agreement FTL had agreed with PAL to do so in the case of any shipment for export. These documents, of course, would have disclosed the declared value of the shipment.[1]

After the plaintiff received the usual "receipt" from Mercury, he mailed the completed Shipper's Letter of Instructions, export declarations, and customers' invoices to PAL. PAL sent the plaintiff a completed air waybill the following week. Prior to this, however, the shipment had disappeared while in the custody of FTL because of its failure to exercise "due care." PAL claims that it is not liable, because the loss was due to the negligence of FTL. FTL claims that it is not liable for more than a nominal sum, because the plaintiff never declared the value of his shipment to its agent in New York.

PAL bases its claim for complete exoneration on various provisions of its tariff on file with the Civil Aeronautics Board and of the Warsaw Convention.[2] The effect of these provisions was to shield PAL from any liability arising from acts or omissions by other carriers which PAL could select to carry out portions of the carriage. PAL argues that this loss occurred on another line and was due to the negligence of an-

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[1] Under the Interline Agreement, FTL was under no obligation to obtain documents which would show the value of the shipment if it was for domestic transportation only. As the district court found, FTL erred here by handling the plaintiff's shipment "document-wise as a domestic transaction instead of an export transaction."

[2] Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention), 49 Stat. L., Pt. 2, 3000 *et seq.*

other carrier. But these provisions are inapposite, for the district court properly held PAL liable for its own omissions, and not those of FTL. Thus this is not a case of imputed liability.

It is clear that had the plaintiff declared the value of his shipment to the FTL agent in New York, FTL would be liable to the plaintiff for the full value of his loss. But he is precluded from making a direct recovery because of the failure to disclose this necessary information.[3] His loss stems, therefore, from a failure to make proper disclosure. But from the plaintiff's point of view this disclosure was unnecessary. The shipping procedures adopted by PAL led him to believe that once he made a declaration of value to it, he would acquire the desired protection. For the shipment in question the plaintiff made declarations both on the phone on June 10 and in his Shipper's Letter of Instructions. Without further warning from PAL he was justified in assuming that this was all that was necessary to protect the shipment from New York to Hong Kong. Obviously the plaintiff was not seeking to avoid higher freight rates by this procedure, for he expected and agreed that the declaration to PAL would make the shipment subject to these higher rates. And there is no indication in the record that such a charge would have been limited to the San Francisco-Hong Kong portion of the trip. Under the Interline Agreement it is probable that PAL would have collected the higher freight charge for the whole trip and remitted to FTL the portion due it for carriage from New York to San Francisco.

[3] The FTL tariff on file with the Civil Aeronautics Board limited its liability unless the shipper declared the value of his shipment and paid an increased freight charge.

Under these circumstances PAL was under a duty to the plaintiff to inform FTL of the value of the shipment or at least to inform the plaintiff to declare the value when he delivered the package to Mercury. There would be a clear case of liability had PAL delivered the package to FTL without making the necessary declaration of value.[4] Here plaintiff, in effect, made the delivery for PAL, and its failure properly to instruct him was a breach of duty rendering it liable.

In the alternative PAL contends that the plaintiff's recovery from it must be limited under Article 22(2) of the Warsaw Convention, which provides that "unless the consignor has made, at the time the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum" the carrier's liability is limited to 250 francs per kilogram. In this situation the argument is bold. The obvious purpose of the Article is to inform the carrier of the risk it assumes in providing carriage for a valuable shipment and to allow it to take the necessary steps to minimize that risk. Here PAL was given the necessary information in precisely the fashion it chose. Moreover the plaintiff literally complied with the Article, for at the time he delivered the package to FTL he had already declared its value and had impliedly agreed to an increased freight charge.

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[4] The provision in the PAL tariff authorizing it "to consign the goods [to another carrier] without declaration of value or with a declaration of value less than the value for carriage declared by the consignor for transportation over the lines of [PAL]" has no application here, where FTL provided a rate schedule for increased liability and its use obviously was contemplated by the parties.

Appendix I

The claim of PAL against FTL presents a more novel problem. Although it was FTL which negligently lost the plaintiff's shipment, PAL is liable because, by failing to take steps to inform FTL of the value of the shipment, it denied plaintiff a direct recovery against FTL. But there is a clear difference in the degree of culpability, and the circumstances warrant the application of the doctrine of primary and secondary liability. Since FTL was the primary wrongdoer and since PAL's liability stems entirely from conduct which deprived the plaintiff of rights against FTL, PAL is entitled to be indemnified. See *Banks* v. *Central Hudson Gas & Elec. Corp.*, 2 Cir., 224 F. 2d 631, certiorari denied 350 U. S. 904; Restatement, Restitution §94 (1937).[5] FLT's tariff on file with the Civil Aeronautics Board limited its liability unless FTL was informed of the value of the shipment. This aspect of the filed tariff does not bar PAL's claim here, however, since its use as a defense against PAL is in effect waived by FTL's agreement under the Interline Agreement to request from the shipper documents which would have disclosed the shipment's special value.

Judgment affirmed.

[5] The Supreme Court's caution in *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, 569, that theories of primary or secondary negligence are inappropriate "in the area of contractual indemnity," is inapplicable here, where PAL's right of indemnity arises by operation of law. Respondent's right of indemnity in *Weyerhaeuser* was "of the essence of petitioner's stevedoring contract," and "not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship." See *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 133; *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, *supra*, 355 U. S. 563.

APPENDIX II

Opinion of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 55—206

HOWARD ORLOVE, doing business as H. ORLOVE CO.

vs.

PHILIPPINE AIR LINES, INC. and THE FLYING TIGER LINE, INC.

APPEARANCES:

HILL, RIVKINS, MIDDLETON, LOUIS & WARBURTON, Esqs.,
Attorneys for Plaintiff;
Joseph R. Cannata, Esq., and
David L. Maloff, Esq., of Counsel.

DWIGHT, ROYALL, HARRIS, KOEGEL & CASKEY, Esqs.,
Attorneys for Defendant Philippine Air Linse, Inc.;
Caesar L. Pitassy, Esq., and
William F. Koegel, Esq., of Counsel.

MENDES & MOUNT, Esqs.,
Attorneys for Defendant The Flying Tiger Line, Inc.;
George W. Clark, Esq., of Counsel.

Appendix II

Decision

(Walsh, J.)

The Court: Well, I appreciate very much all the effort you have put into the case and I appreciate especially your giving me the briefs and exhibits in advance so that I have had a chance to study them before the commencement of the trial, and consequently I must say I have enjoyed the trial very much.

The problem I don't regard as an easy one, but I am going to decide it now. I think it is primarily a matter of getting the facts straight and getting them straight while they are still fresh in my mind, and if by chance I make any errors on the law they are easily rectified, but I hope I don't make any.

As I have gotten the picture of this transaction, the one person who seemed to me completely innocent throughout was the plaintiff. I have listened to him testify. I believe he has been honest and forthright and accurate with us. We don't have a situation here of a chiseler who tried to avoid paying freight charges by concealing the ad valorem or by not giving the value of his shipment. Here he tried to give, he did give the value of his shipment. He was billed for freight charges on the actual value of that shipment but because of the somewhat clumsy liaison between Flying Tiger and Philippine Air Lines he found himself in the position where both air lines are saying he should have given this information not once but twice.

Now under those circumstances I am going to give judgment for the plaintiff.

Appendix II

As I reconstruct the picture the plaintiff made a contract for carriage with Philippine Air Lines. He telephoned their New York office. He received his instructions and he followed those instructions to the letter.

He was told to send his documents, his letter of instruction to the Philippine Air Lines office, which he did.

He was told or asked to bring the freight physically to The Flying Tiger reception depot run by the Mercury Trucking Company, which he did. He was not told that he should give them a separate set of documents, and when he got there he was not asked for a separate set of documents. He gave everything he was asked for, and I think inadvertently and negligently the man at the Mercury depot proceeded to handle this matter document-wise as a domestic transaction instead of an export transaction.

In all this I do not see how Mr. Orlove was in any way at fault, and I do not see how he can be said to have waived any rights as a customer of the carrier, and I do not think that this is what the Warsaw Convention had in mind, and I do not think this is what is meant by the tariff provisions for limitation of liability where there is a failure to disclose the value of a shipment.

As I read the Convention, and as I read the plaintiff's brief with respect to it, I was impressed with the fact that it is not any particular formality which is essential with respect to the giving of notice of value. I mean, if in substance it is given and if the shipper honestly discloses his value and inadvertently (and particularly here where the inadvertence is due to the

clumsy relationship between the two carriers, of which he could not be expected to have full comprehension) there is a failure to get this information as to value immediately to all the people who might like to know about it, I do not think that was intended by the Convention to be a basis for denying recovery as the defendants contend in this case.

Whether the conversation he had with the Philippine Air Lines clerk, Mr. Philliba, constituted a waiver of the carrier's right to have a declaration of value at the moment of turning the freight over to them or whether it constituted Mr. Orlove, in a sense, as agents of the Philippine Air Lines to perform the physical work of carrying the package to Flying Tiger instead of leaving it at a Philippine Air Lines installation is a point I do not think we really have to labor. I think that both constructions could be justified, and in either case the claimed bar, based upon his failure to disclose the value of the shipment at the time it was placed under the physical control of the carriers, was removed by the conversation he had with Philliba.

There is no reason for believing that Mr. Orlove had any knowledge whatever of the interline relations or the obligations of one carrier to the other. I simply mention that in passing.

I will go further now, and I do not believe it is necessary for me to take this step, but I shall take it in passing, and I shall hold that where a carrier is entitled to limit liability based upon the non-disclosure of value of a shipment, under certain circumstances and under the circumstances described in this case, it many not claim such limitation without making actual inquiry as to value.

Appendix II.

Now, here are a couple of illustrations of what I mean.

Where, as in the case of Philippine Air Lines, the forms were sent to the shipper and left with him to be mailed in by him, then there is no need for further inquiry. He has the forms and he must fill them out.

On the other hand, where you go to a loading platform and there are employees there who are telling you what to do and asking questions, or if you go in to a freight office and there is a man there who is filling out the form for you, and if he does not ask as to the value of the shipment, why, I do not think either carrier can claim any defense on the failure to disclose the value of the shipment. The Convention was not designed just to take care of an expert like Mr. Orlove, who does a lot of export-import work—it was designed to take care of less-trained people, approved and ratified to take care of less-trained people.

Here there is a conflict in the testimony. Mr. Orlove says he was not asked as to the value of the shipment; that he answered fully all the information he was asked for.

Mr. Steinbeck's deposition says that Mr. Steinbeck did make this inquiry but that Mr. Orlove made no answer.

Now, I just do not believe Mr. Steinbeck. It seems silly to me that a man would make that inquiry and not get an answer. Either it has no value or it does have value. I think it is all the more silly in this case where Mr. Orlove's consignee was going to pay freight charges on the basis of a declared value. I can see no reason why he would conceal the value from Mr. Steinbeck if he was so asked.

I do not know that I have much more that I need to say as between the plaintiff and Philippine Air Lines. I should add that on Monday, June 13th, the Philippine Air Line issued to plaintiff its Airway Bill showing receipt of the letter of instructions and fixing freight charges based upon the full value of the shipment. The issuance of this document ratified the oral arrangement between plaintiff and Mr. Philliba, the Philippine Air Lines representative.

Next, I reject the claim of Philippine Air Lines that, under its tariff, plaintiff's claim must be brought directly against Flying Tiger. Philippine Air Lines said, "Well, we had a contract with the plaintiff but under that contract, under the provisions of our tariff, we could turn over our work to another carrier and it is the plaintiff's agent, and if something goes wrong while the shipment is in the control of the other carrier to whom we turned our responsibilities over, the plaintiff must look to them."

I do not think that that provision of the P. A. L. tariff can be raised here because it is conceded by the Philippine Air Lines that they must do that in a way free from fault. In other words, they cannot be negligent in turning it over and still expect to escape liability.

Here I think that they did not exercise due care.

When Mr. Philliba told the plaintiff to send his shipping documents to the Philippine Air Lines and deliver the physical freight to somebody else, The Flying Tiger Line, or The Flying Tiger Line's agent, the need for great particularization became immediately apparent.

Appendix H

If it was going to be claimed that Mr. Orlove had a duty to make a double declaration of value he should had been told so then. In the absence of being so told it was the duty of the Philippine Air Lines to see that the appropriate documents, whatever documents were necessary for the safety of the property or the discharge of the other carrier's responsibility with respect to it, were gotten to the other carrier to whom it was going to delegate this responsibility. Here that was not done appropriately and with due care.

There is a sort of paradoxical situation that develops from that because the Philippine Air Lines has, by failure to provide for adequate notice of value to The Flying Tiger Line, deprived the plaintiff of his direct rights against The Flying Tiger Line, or at least deprived him of those rights on certain grounds.

Therefore, I think the plaintiff is entitled to judgment against the Philippine Air Lines. As I will tell you in a little while, I think the Philippine Air Lines has rights of its own against The Flying Tiger Line which it can assert, but those rights are not available to the plaintiff and therefore the plaintiff must get judgment against the Philippine Air Lines.

Mr. Cannata: May I inject at this moment? Is that the full amount of declared value?

The Court: On the question of declared value I understood there was a 10 per cent markup. Why should he get that?

Mr. Cannata: No, not from the declared value.

The Court: He should get the amount he was going to get from his consignee.

Mr. Cannata: No, it is the declared value, unless the carrier comes in and proves for some reason or

other that the price is considerably higher or has no bearing to the true value of the merchandise.

Now, the 10 per cent is to allow for the loss at the place of destination. Actually these goods in Hong Kong were worth more that the declared value because the markup was very slight, and the price of this commodity was going up all the time.

The Court: How are these goods worth more to the plaintiff than he would have gotten for them if he sold them?

Mr. Cannata: That is true, but he paid a declared valuation of $24,150. It is like insurance.

The Court: But if I assure my house for $50,000 and it is only worth $40,000, I do not get the $50,000 if it burns down.

Mr. Cannata: There has been no rule that a shipper is not entitled to less than the declared value when he has so asserted. He has paid the insurance based on the declared value here, and to that extent even underwriters who have insured the shipper, while it has no direct bearing on this case, have gone along on the same theory that the value of the shipment at the time, which was $24,150, which was the sales price plus 10 per cent, that is the ordinary, usual procedure.

The Court: I may be wrong on that, and you can all argue that point further with me if you want to. My tentative disposition—and it is only tentative as to the amount—is that he should get the amount that he was to get from the consignee plus interest and costs.

Now, coming to the dispute between the two air lines, I think that under the interline agreement The Flying Tiger owed a duty to the Philippine Air Lines

under the facts of this case to make inquiry on the basis of an export shipment. I will find that the shipment was addressed to D. E. Levy, Hong Kong, via the Philippine Air Lines. That is the substance of Mr. Orlove's testimony as I understood it and as I pieced it together from the fact that The Flying Tiger Line made their papers out to the Philippine Air Lines.

Now, under those circumstances it was sheer folly to treat the transaction as a domestic transaction. It was an export transaction and our whole difficulty here has stemmed from the fact that The Flying Tiger Line treated it as a domestic transaction.

If The Flying Tiger Line had performed their duty under their interline agreement, they would have inquired for a customs declaration as expressly required of them; if they had done that, the full value would have been disclosed or at least the customs value, which is substantially the full value in this case. Failing to do that they breached their contract. Having failed to perform its own duty in this regard Flying Tiger Line may not take advantage of a condition precedent specified in its own tariff that the shipper disclose to them the value of the shipment. This makes it unnecessary for me to decide whether the interline agreement was subject to The Flying Tiger tariff in this respect. Flying Tiger, having failed to perform its own express duty in that regard, cannot raise that claim.

Not only should Flying Tiger have asked for the customs declaration as is expressly required of them, but the surrounding circumstances and the obvious fact that this was an export transaction, in my opinion

required them to go further and ask for the letter of instructions or to inquire about the letter of instructions to Philippine Air Lines and to find out in greater detail as to what had been done with respect to the Philippine Air Lines in this regard.

Then, of course, there seems to be no doubt that The Flying Tiger Line lost this shipment during its flight from Newark to Burbank, California. In the absence of proof of any unusual incident during the flight and in the absence of any proof by them as to the care with which it was handled I shall find that it was lost due to a failure to exercise due care.

Incidentally, there has been no proof either by The Flying Tiger Line that this shipment would have been handled in any way differently if they had been given notice of its value. So far as we know there is no different routine in such cases. We do see in the interline agreement, I believe, special provisions for shipments of over $100,000; they required some appropriate officer's approval before they can be accepted. But in this case I saw nothing in the interline agreement or the tariff that suggests a different handling on the basis of the value no greater than the amount here involved.

I think that is about all I have to say. I will find the fault of The Flying Tiger Line to be the primary fault, the fault of the Philippine Air Lines to be the secondary fault. I will give Philippine Air Lines judgment over against The Flying Tiger Line.

If you folks want to ask for any more precise findings now I will be glad to make them for you.

Mr. Pitassy: I have no further findings.

The Court: Mr. Clark, do you have anything further as the primary receiving end of today's work?

Appendix II

Mr. Clark: May I confer a minute?

The Court: Yes, surely.

Mr. Clark: I would like to request findings in regard to the failure of Philippine Air Lines to wait receipt of the proper documents from The Flying Tiger company before issuing any bill that could in any way bind or place liability on The Flying Tiger Line.

The Court: Well, I won't find in the form you suggested. I will find that the Philippine Air Lines received its first documents in this case on Monday, June 13th, in the form of a letter of instructions from Mr. Orlove and a slip of paper giving The Flying Tiger Line's receipt number on it, the air bill request number; that at that time it issued the Philippine Air Lines' way-bill; that at that time it had, as far as the record shows, no document from The Flying Tiger Line.

I do not know when The Flying Tiger Line air bill was delivered, if ever, to the Philippine Air Lines or to whom it was delivered. So far as I know it was produced today from The Flying Tiger Line's files.

Does that cover the facts in that regard without getting into other matter?

Mr. Clark: At the time they did not have that air bill request, Philippine, when——

The Court: There is certainly nothing in the record to show they had the air bill request.

Mr. Clark: No, they did not have that air bill request but, if your Honor please, I am interested in regard to the question of findings as to the failure—as to the fact that The Flying Tiger Line did not deliver any documents to Philippine showing the basis

on which The Flying Tiger Line accepted the shipment; therefore Philippine had no authority to issue any air bill upon which The Flying Tiger Line could subsequently be found liable.

In other words, Philippine should not have issued its air bill at all until receiving proper documentation from The Flying Tiger Line which would bring the matter within the agreement. With no documentation the matter was not at all within the agreement and Philippine had no right issuing an air bill binding The Flying Tiger Line, but could only issue an air bill binding itself. It went ahead on its own accord.

Mr. Pitassy: If your Honor please, I did not understand your Honor to say you were holding Flying Tiger on our air way bill.

The Court: I am holding them on their interline——

Mr. Pitassy: On their failure to live up to the provisions of the interline agreement and their failure to treat the export shipment in the manner provided for in the interline agreement.

Now, by failing to do that they deprive themselves of the information of the declared value and that is why they are being held responsible, as I understand it.

Am I correct on that?

The Court: I will find that actually, as Mr. Dart said, these matters were not handled with the greatest of precision at this time.

As I read Mr. Steinbeck's deposition the impression is left with me that this was the practice in which the parties indulged. There were telephone calls backwards and forwards from Mr. Steinbeck to Mr.

Phillibaf, and matters were handled in this lax way and Mr. Dart's testimony simply confirms the impression that I had had in that regard.

I have found the facts as to the issuance of the way-bill without documents being received first from The Flying Tiger Line. I will not hold that that exculpates The Flying Tiger Line from liability here. I will hold that under the interline agreement, and under the practice of the parties as it had developed, they were liable nonetheless. This is not a case in which Philippine Air Lines issued an air bill for freight not actually received by Flying Tiger or for a shipment which for some reason Flying Tiger actually refused or even had the right to refuse to carry. Any lack of precision as to the handling of the formal documents—under the circumstances of this case has no effect upon liability. This is not to say, however, that Philippine Air Lines may obligate Flying Tiger by the promiscuous issue of air bills; here plaintiff's claim would probably have been sustained even though the Philippine Air bill had never been issued.

Mr. Clark: Well, if the Court will respectfully mark my exceptions?

The Court: I certainly will.

Mr. Clark: Both to the findings and the decision on the record, please.

The Court: All right, it is so noted.

Anything else? Any other parties want findings?

Mr. Cannata: I don't want any findings, Judge, but I would like one thing clarified on the question of interest. Are we entitled to interest from the date of loss or the date of the bill of lading, June 13, 1949?

The Court: I would say yes.

Mr. Cannata: I just want it clear for the record.

The Court: Do any of you agree as to his claim about declared value, that he is entitled to declare value over the amount, the price he would have received from the consignee?

Mr. Pitassy: I would say that the declared value in and of itself controls unless you have other evidence with respect to the value of the shipment.

The Court: Isn't the invoice other evidence?

Mr. Pitassy: Yes, but I think the evidence of the value is not plus the 10 per cent, it is without the 10 per cent.

The Court: Yes. In other words, I would take the invoice.

Mr. Cannata: May I say this, Judge? If this were reversed, if, for example, the shipment had gone forward without any declaration of value set forth in the column marked "Declaration of value for carriage", and only the one on the right for customs was marked, then we would be faced with the situation that no matter what we said in the column for customs we would not get paid that amount even though that was the true value. We would be limited by the amount set forth in the box under "Declaration for carriage". It is an insurance for the benefit of the shipper.

The Court: In other words, I think it is the same problem as where you over-insure your house. If you do not have it insured for enough you cannot get more than your policy. On the other hand if you have it insured for two much you cannot get more than your total loss.

Mr. Cannata: That is because of the 80 per cent clause.

The Court: I do not know——

Mr. Cannata: That does not apply here, if your Honor pleases, because in reverse it is penalizing the plaintiff. Just as I pointed out before, suppose for the sake of argument——

The Court: You are only penalizing him to the extent that he paid a few dollars more for his freight to protect it up to $24,000 instead of paying for the actual amount.

Mr. Cannata: Yes, except he thought, he said he would insure this on the basis of getting a return, if it was lost; he might have to pay more to replace this. That is the thing to take into consideration. Suppose he would have to replace this. I don't know whether he did. Suppose he had to go out in the open market and pay more for it. The prices were going up all the time.

The Court: We do not have any proof of market price or anything else. I will let it stand as it is. If you want to go further on that let me have a brief in a week on it and you can have three or four days to answer.

Mr. Clark: May we have a stay of more than 10 days, your Honor?

The Court: What do you want, 30 days?

Mr. Clark: I would appreciate that, yes.

The Court: 30 days, all right, fine.

(Signed) LAWRENCE E. WALSH
U. S. D. J.

Dated: New York,
October 10, 1957.

APPENDIX III

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of July, one thousand nine hundred and Fifty-eight.

Present:

HON. CHARLES E. CLARK,
Chief Judge

HON. CARROLL C. HINCKS,
HON. POTTER STEWART,
Circuit Judges

HOWARD ORLOVE, d/b/a H. ORLOVE CO.,
Plaintiff-Appellee-

v

PHILIPPINE AIRLINES, INC., & THE FLYING TIGER LINE, INC.,
Defendants-Appellants

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for

the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is affirmed, with costs to the appellee, Orlove Company.

A. DANIEL FUSARO,
Clerk
By JOHN M. DOYLE,
Deputy Clerk